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In the Supreme Court of the United States

October Term, 1958

EARLE MASSEY EATON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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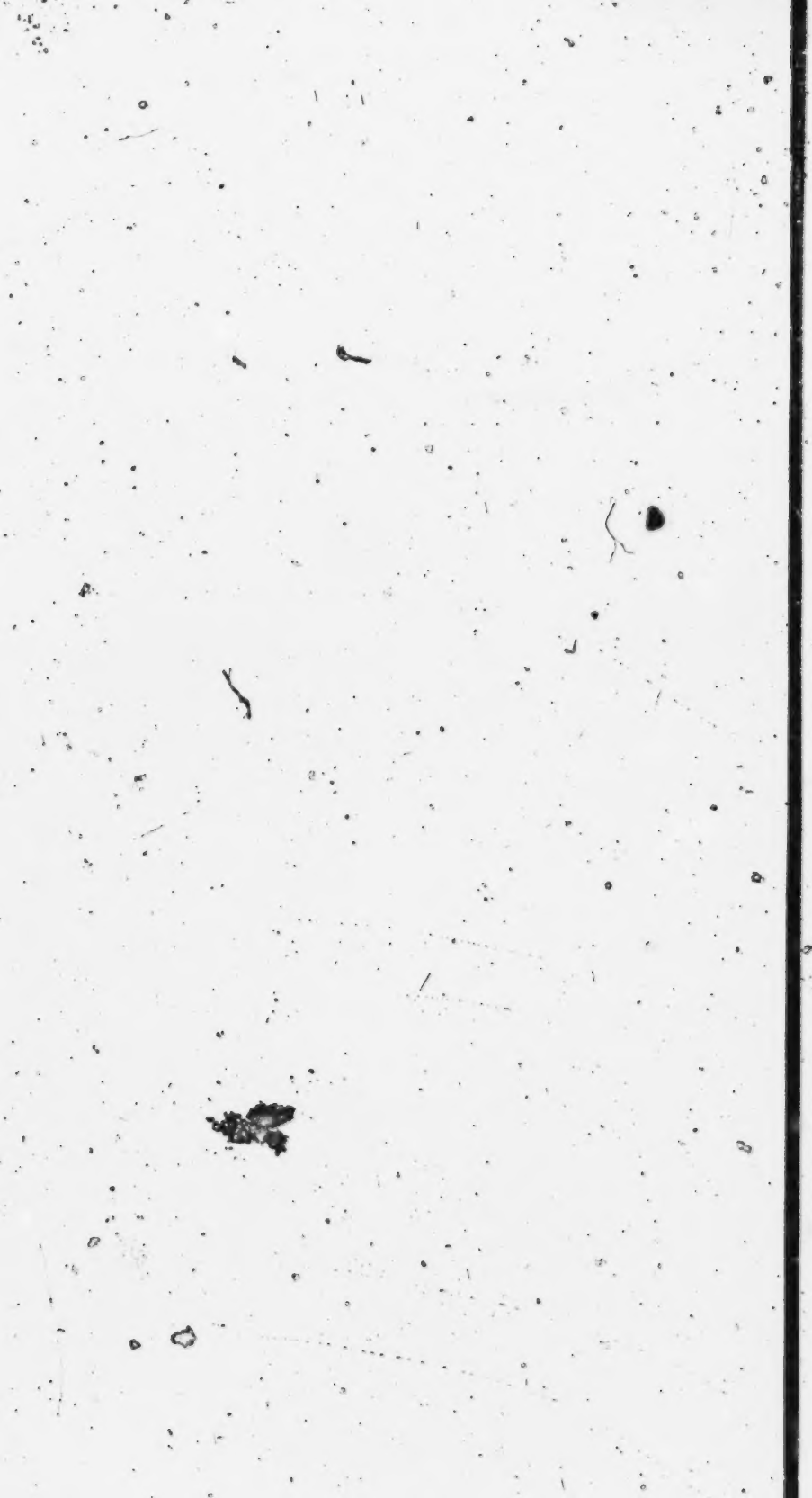

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 703

ERWIN MANGET ENZOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 251-256; Pet. App. 12-17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1958 (R. 257; Pet. App. 11). A petition for rehearing was denied on January 14, 1959 (R. 258-263). The petition for a writ of certiorari was filed on February 12, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's co-conspirator was sufficiently identified as a party to a monitored conversation regarding a planned narcotics sale to render the conversation admissible in evidence.

2. Whether the Court of Appeals could remand the case to the district court for entry of a proper mandatory sentence of at least five years' imprisonment, in lieu of the invalid four-year sentence imposed by the district court.

STATUTES INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * * *

26 U.S.C. (Supp. V) 4705(a), 68A Stat. 551, provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. (Supp. V) 7237, 70 Stat. 568, provides:

* * * * * *

(b) Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) * * * shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *

• • • • •

(d) Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section * * * the imposition or execution of sentence shall not be suspended, probation shall not be granted, * * *.

STATEMENT

Petitioner and Albert A. Tucker were charged in count 1 of an indictment in the United States District Court for the Northern District of Georgia (R. 1-4) with a conspiracy to sell unlawfully narcotic drugs not in pursuance of a written order in violation of 26 U.S.C. 4705(a) (*supra*, p. 2). Counts 2 and 3 charged petitioner and Tucker with the unlawful sales of narcotics as substantive violations of 26 U.S.C. 4705(a) and 26 U.S.C. 4704(a) (R. 4-5). Tucker entered a plea of guilty and received a sentence for four years' imprisonment which he was serving at the time of the trial (R. 21-22). Petitioner was found guilty on the conspiracy charge alone, and was sentenced to four years' imprisonment (R. 241-243). On appeal, the Court of Appeals found that there was no error in the trial, but remanded the case to the district court for the entry of a mandatory minimum prison term of at least five years under 26 U.S.C. 7237(b) (*supra*, pp. 2-3), in lieu of the four-year term which the district court had erroneously imposed under the general conspiracy

statute, 18 U.S.C. 371 (*supra*, p. 2), mentioned in the indictment (Pet. App. 11, 14-17).

Pertinent evidence adduced at the trial may be summarized as follows:

In January 1957, in Atlanta, Georgia, petitioner asked Tucker whether he could dispose of some narcotics. Pursuant to this request Tucker contacted a drug addict named Carroll, and offered to sell him narcotics (R. 12, 13, 44). Carroll reported this to federal narcotics agents and worked as an undercover agent for them in the transactions which ensued (R. 45, 46, 47, 48).

On March 20, 1957, the date of a number of the overt acts alleged in the conspiracy count and the date of the two substantive counts (R. 2, 3, 4), Tucker, as the go-between for petitioner, negotiated with Carroll for a narcotics sale. Tucker telephoned petitioner, who, in his station wagon, delivered the narcotics to Tucker. Carroll paid Tucker with $275 in government funds which the agents had given to Carroll for the purchase (R. 13-17, 44-46). Petitioner gave Tucker $20 and drove away with the remaining $255 (R. 16-17). This sale occurred under the surveillance of two federal narcotics agents and an Atlanta detective (R. 57-65, 104-109, 123-126). At that time no arrest was made, Carroll being engaged in other undercover investigations not yet completed (R. 98, 99).

On April 11 and 12, 1957, Carroll and Tucker had further discussions about another narcotics sale for $500 (R. 17, 18, 20, 65, 69-71, 126-128). Tucker also met with, and talked to, petitioner several times about the intended sale. Petitioner gave Tucker a list of narcotics (U. S. Ex. 1) which petitioner described as "what he had left" (R. 17-21). No sale was made at this time.

however, since Tucker became so intoxicated that he was arrested for drunkenness (R. 20, 47).

The following colloquy occurred during the direct examination of agent Barber in regard to the April 11, 1957, conversation between Carroll and Tucker (R. 65-66):

Q. Now; did you make any further investigation?

A. Yes, sir; on the night of April 11, I observed Agent Thomas place a Schmidt device on special employee Avery Carroll and observed Avery Carroll to enter 313 Washington Street.

Q. What is that Schmidt device?

A. It's a pocket transmitter, it is a miniature radio transmitter.

Q. All right.

A. And we—I had previously determined that Albert Tucker was living at 313 Washington Street, and over the Schmidt device I heard Avery Carroll go up and talk to a person that he identified as Tucker.

Mr. Asinof: We object to that.

The Court: I sustain it. * * *

* * * * *

Q. Did you make any other observations after that time, Mr. Barber?

The Court: So you won't misunderstand; I don't sustain any objection to what he heard over the Schmidt device, I sustain the objection to what Carroll said or who he said he was talking to over the device, any identification that he might have made.

Q. What did you—what else happened on that night at the time you heard anything on the—did you have a receiver for the—

A. Yes, sir; we were parked on Washington Street—

Q. —Schmidt device?

A. —just across the street from 313 Washington Street, and I could hear over the Schmidt device, a person said his connection still had some tincture of opium—

Mr. Gower: We object unless it was Albert Tucker and he can identify him as Albert Tucker.

The Court: Well, Albert Tucker has testified and Carroll has testified in the case, and I am going to admit it. Go ahead.

A. Person said that his connection had some tincture of opium, some demerol, some codeine tablets—

After defense objections as to lack of a proper foundation for testimony as to what was heard over the radio transmitter, the witness stated that the transmitter had previously been tested for accuracy and that he could recognize Carroll's voice coming in over it (R. 66-69). Over defense objection as to lack of identification of the person talking to Carroll, the agent was permitted to testify that "This other person on the Schmidt device said that he could not contact his connection that night, but he could the following morning, and that he could call Avery Carroll about noon" (R. 69-70).

During the April 11 conversation, Carroll was out of sight of the agents when he entered the building at 313 Washington Street (R. 126), but on April 12 the agents

saw Carroll with Tucker when they monitored his conversation on the Schmidt device (R. 70, 71, 127, 128). Tucker, Carroll, and the agents testified regarding these conversations (R. 17, 47, 66, 69-70, 126-128). On redirect examination, Carroll testified that, while he was wearing the Schmidt device, the only persons with whom he had conversations concerning narcotics were Tucker and the narcotics agents (R. 101, 102).

Defense counsel stipulated that the list of narcotics drugs (U. S. Ex. 1) was in the petitioner's handwriting, and that the drugs obtained by Carroll in the sale on March 20, 1957, were drugs which were included in the relevant narcotics statutes (R. 135, 125-126). The list and the narcotics were received in evidence without objection (R. 136, 137).

Petitioner testified on his own behalf that he had never had any dealings in narcotics (R. 156). He admitted writing the list of narcotics (U. S. Ex. 1), but explained that he had done so at Tucker's request only to humor Tucker as an intoxicated person. Petitioner stated that, after he had finished writing the list, Tucker suggested that he could buy these drugs with a proposed loan from petitioner and sell them at a profit in which petitioner would share. Petitioner testified that he refused to participate in such a venture (R. 155-156, 175-176).

ARGUMENT

1. There is no merit to petitioner's contention that agent Barber's testimony as to the April 11, 1957, conversation which he heard over the Schmidt device between Carroll and another person, supposed to be Tucker (see the Statement, *supra*, pp. 5-6), was inadmissible hearsay, since Tucker had not been sufficiently

identified as the other party to the conversation (Pet. 6-7). Petitioner concedes, as he must, that if Tucker was the other party to the conversation, then the conversation was admissible since Tucker was charged as a co-conspirator (Pet. 6). See *Delaney* v. *United States*, 263 U. S. 586, 590.

The argument denying sufficient identification of Tucker overlooks the fact that on April 11 Carroll was seen by the agents to enter 313 Washington Street, the known address of Tucker, shortly before the conversations were recorded (R. 65, 126). Then on April 12, when further conversations occurred regarding the same planned narcotics sale which eventually did not take place, agent Thomas, while listening in on the Schmidt device, saw Carroll and Tucker while they were conversing (R. 127, 128). Moreover, after the question of Tucker's identity was raised, Carroll testified on redirect examination that, while he was wearing the Schmidt device, the only persons with whom he had conversations concerning narcotics were Tucker and the narcotics agents (R. 101, 102). This testimony eliminated the unknown drunken person to whom Carroll said he had spoken, as the possible participant in the challenged conversation with Carroll, since the discussion was definitely about narcotics. And even though Carroll did not specifically name the "narcotics agents" to whom he had spoken while wearing the Schmidt device, it is clear that he was referring only to agents Barber and Thomas. Other parts of the record show that it was with these agents that Carroll dealt in arranging the narcotics sales involved (R. 57, 65, 67-70, 123-128). The result is that Tucker was satisfactorily identified as the other person to the conversation with Carroll on April 11, 1957. Cf. *On Lee* v. *United*

States, 343 U. S. 747; *United States* v. *Bucur*, 194 F. 2d 297, 303-304 (C.A. 7)

The challenged conversation on April 11, moreover, was not significant in the light of all the evidence, including the conversation on April 12. Petitioner was not mentioned by name as the source of the narcotics, but merely referred to as the "connection". The crucial and important evidence was the testimony of Tucker disclosing that the "connection" he referred to was in fact the petitioner.

2. There is no substance in petitioner's complaint that the Court of Appeals improperly ordered a remand for the district court to enter an appropriate sentence of at least five years' imprisonment, since the original four-year sentence was invalid (Pet. 7-9).

Even though the indictment mentions the general conspiracy statute, 18 U.S.C. 371 (*supra*, p. 2), under which the trial court erroneously imposed the original four-year sentence, it is clear that the conspiracy actually charged was one to commit a violation of 26 U.S.C. 4705(a) (*supra*, p. 2), which carries with it a minimum mandatory penalty for five years' imprisonment under 26 U.S.C. 7237(b) (*supra*, pp. 2-3) (R. 1, 3-4). It is the indictment itself, and not the statute cited, which determines the offense charged. *Williams* v. *United States*, 168 U. S. 382, 389; *United States* v. *Hutcheson*, 312 U. S. 219, 229. Between the two statutes punishing conspiracy, the specific statute takes precedence over the general statute. *Masi* v. *United States*, 223 F. 2d 132, 133 (C.A. 5), certiorari denied, 350 U. S. 919; *United States* v. *McKnight*, 253 F. 2d 817, 820 (C.A. 2); and see *Kepner* v. *United States*, 195 U. S. 100, 125; *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

Since the sentence imposed was invalid as less than the statutory minimum, the Court of Appeals, upon suggestion by the government, had power to remand the case to the district court for a proper sentence. This procedure will not violate the double jeopardy clause of the Fifth Amendment. *Bozza* v. *United States*, 330 U. S. 160; *Hayes* v. *United States*, 249 F. 2d 516 (C.A. D.C.), certiorari denied, 356 U. S. 914; *Barrow* v. *United States*, 295 Fed. 949 (C.A. D.C.); Rule 35, F. R. Crim. P.[1] The Court of Appeals was merely ordering the district court to set aside a sentence which it had no authority to impose in the first place. When the district court corrects the sentence it will impose "a valid punishment for an offense instead of an invalid punishments for that offense." *Bozza* v. *United States, supra*, at 167.

There will be no illegal increase of petitioner's sentence, since the original sentence was void *ab initio*.[2] The decision below is not at variance with *Ex parte Lange*, 18 Wall. 163, 174-176, where part of the original sentence for both imprisonment and a fine was valid and the prisoner fulfilled a valid sentence by payment of the fine, so that further punishment was held violative of the double jeopardy clause. A valid sentence may not be increased, but an invalid sentence may be corrected.

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[1] Rule 35 provides: "The court may correct an illegal sentence at any time. * * *"

[2] Petitioner has not begun to serve any part of the original four-year sentence. The Court of Appeals' mandate was stayed pending this Court's ruling on the petition for a writ of certiorari (R. 265).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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